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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73 557

BILLY JENKINS,
Appellant
v.
STATE OF GEORGIA
Appellee

On Appeal from the Supreme Court of Georgia

JURISDICTIONAL STATEMENT

TRENCH C. COXE
WILLIAM H. SCHRODER, JR.
1500 Candler Building
Atlanta, Georgia 30303

LOUIS NIZER
477 Madison Avenue
New York, New York 10022

JAMES BOURAS
522 Fifth Avenue
New York, New York 10036
Attorneys for Appellant

DAVID H. FLOYT
J. KIRK GUILLIAN
Troutman, Sanders, Lockerman
& Ashmore
Of Counsel

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Questions Presented	4
Statement	4
The Questions Are Substantial	10
Conclusion	25

INDEX OF CITATIONS

Court Cases	Page
Baggett v. Bullitt, 377 U.S. 360 (1964)	16
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)	2
Brown v. Oklahoma, 408 U.S. 914 (1972)	13
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)	10
California v. LaRue, 409 U.S. 109 (1972)	11
Cason v. City of Columbus, 409 U.S. 1053 (1972)	13
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	19
Coates v. City of Cincinnati, 402 U.S. 611 (1971)	14, 16
Cohen v. California, 403 U.S. 15 (1971)	2, 11, 18
Cole v. Arkansas, 333 U.S. 196 (1948)	19
Connally v. General Construction Co., 269 U.S. 385 (1926)	20

Court Cases **Page**

Cooley v. Endicator, 340 F. Supp. 15 (N.D. Ga. 1971) 12

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921) 2

DeJonge v. Oregon, 299 U.S. 353 (1937) 17

Frank v. Mangum, 237 U.S. 309 (1915) 17

Freedman v. Maryland, 380 U.S. 51 (1965) 2

Garner v. Louisiana, 368 U.S. 157 (1961) 18

In Re Giannini, 69 Cal. 2d 563, 72 Cal. Rptr. 655, 446 P. 2d 535 (1968) 21

Ginzburg v. United States, 383 U.S. 463 (1966) .. 14

Gooding v. Wilson, 405 U.S. 518 (1972) .. 14, 15, 16

Gornto v. State, 227 Ga. 46, 178 S.E.2d 894 (1970) 9

Grayned v. City of Rockford, 408 U.S. 104 (1972) 17

Gregory v. City of Chicago, 394 U.S. 111 (1969) .. 19

Hunt v. Keriakos, 428 F. 2d 606 (1st Cir. 1970) .. 15

Jacobellis v. Ohio, 378 U.S. 184 (1964) 10

Jenkins v. State, — Ga. —, — S.E.2d — (1973) .. 8

Kaplan v. California, — U.S. — (1973) 20

Kois v. Wisconsin, 408 U.S. 229 (1972) 24

Lewis v. City of New Orleans, 408 U.S. 913 (1972) 13

Court Cases	Page
Memoirs v. Massachusetts, 383 U.S. 413 (1966)	8, 24
Miller v. California, — U.S. — (1973)	*passim*
Mishkin v. New York, 383 U.S. 502 (1966)	15
Paris Adult Theatre I v. Slaton, — U.S. — (1973)	10, 11, 24
P.B.I.C., Inc. v. Byrne, 313 F. Supp. 757 (D. Mass. 1970)	12
Rabe v. Washington, 405 U.S. 313 (1972)	18
Rosenbloom v. Virginia, 388 U.S. 450 (1967)	15
Rosenfeld v. New Jersey, 408 U.S. 901 (1972)	13
Roth v. United States, 354 U.S. 476 (1957)	11, 23
Schacht v. United States, 398 U.S. 58 (1970)	12
Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969)	18, 19
Southeastern Promotions, Ltd, v. City of Atlanta, Ga. 334 F. Supp. 634, 643 (N.D. Ga. 1971)	12
State v. J-R Distributors, Inc., 512 P. 2d 1049 (July, 1973)	22
Stromberg v. California, 283 U.S. 359 (1931)	18
Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958)	15
Thompson v. City of Louisville, 362 U.S. 199 (1960)	18
United States v. O'Brien, 391 U.S. 367 (1968)	12

Court Cases **Page**

United States v. One Reel of Film, — F. 2d — (1st Cir. July 16, 1973) 21

United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) 14

STATUTES:

Georgia Code Ann.

§26-2105 ..... *passim*

§26-2011 ..... *passim*

§26-2101 ..... *passim*

TABLE OF CONTENTS OF APPENDICES

Appendix A: Opinions of the Supreme Court of Georgia 1

Appendix B: Judgment of the Supreme Court of Georgia 19

Appendix C: Notice of Appeal 21

Appendix D: Arrest Warrant 23

Appendix E: Grand Jury Accusation 25

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO.

BILLY JENKINS,
Appellant

v.

STATE OF GEORGIA
Appellee

On Appeal from the Supreme Court of Georgia

JURISDICTIONAL STATEMENT

Appellant, Billy Jenkins, appeals from the judgment of the Supreme Court of Georgia entered on July 2, 1973 (Appendix B, *infra*), affirming (4-3) the judgment of the Superior Court of Dougherty County finding him guilty of exhibiting the film "Carnal Knowledge" in violation of Georgia Code Ann. Ch. 26-21.

OPINIONS BELOW

The three opinions filed in the Supreme Court of Georgia (a majority opinion and two dissenting opinions) are not yet reported. They are reprinted in Appendix A, 1-17, *infra.*

JURISDICTION

This criminal action was instituted by the State of Georgia in the Superior Court of Dougherty County, Georgia, accusing Billy Jenkins of violating Georgia Code Ann. §26-2105. A jury returned a verdict of guilty, which was affirmed by the judgment of the Supreme Court of Georgia, the State's highest court, entered on July 2, 1973. Notice of appeal was filed on September 20, 1973 (App. C). The jurisdiction of this Court rests upon 28 U.S.C. §1257 (2). *See, e.g., Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282 (1921); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963); *Freedman v. Maryland,* 380 U.S. 51 (1965); *Cohen v. California,* 403 U.S. 15 (1971); *Miller v. California,* — U.S. — (June 21, 1973).

STATUTES INVOLVED

Georgia Code Ann.

§26-2105 Plays, night club acts, motion pictures, television productions or other exhibitions

(a) Every person who, during the course of a play, night club act, motion picture, television production or other exhibition, or mechanical reproduction of human conduct, engages in conduct which would be public indecency under section 26-2011 if performed

in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.

(b) Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television production of other mechanical reproduction containing such conduct shall be guilty of a misdemeanor.

[Georgia Laws 1971 Session, pp. 344, 345, effective April 1, 1971]

§26-2011 Public Indecency

A person commits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor:

(a) An act of sexual intercourse;

(b) A lewd exposure of the sexual organs;

(c) A lewd appearance in a state of partial or complete nudity;

(d) A lewd caress or indecent fondling of the body of another person.

[Georgia Laws 1968 Session, pp. 1249, 1301; effective July 1, 1969]

§26-2101 Distributing Obscene Materials*

*(b) Material is obscene if considered as a whole,

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* §§26-2101(b) and 26-2101(c) are set forth here for the convenience of the Court. Unlike §§26-2105 and 26-2011, which are expressly involved throughout the proceedings below, §§26-2101(b) and 26-2101(c) are involved only in certain stages of the proceedings.

applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

*(c) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, deemed or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

QUESTIONS PRESENTED

I. Whether Georgia Code Ann. §26-2105 is unconstitutional on its face, as applied, and as construed by the Supreme Court of Georgia.

II. Whether Appellant was denied due process of law in the proceedings below, including those in the Supreme Court of Georgia.

III. Whether it is constitutionally permissible to employ "local," as opposed to statewide, contemporary community standards in evaluating the purient interest, appeal and patent offensiveness of allegedly obscene material.

IV. Whether the film "Carnal Knowledge" is obscene.

STATEMENT

"Carnal Knowledge" is a film which was critically acclaimed as one of the "10 Best" pictures of the year 1971 (App. A, 8-9; R. 5, 48).[1] Actress Ann-Margaret received an Academy Award nomination for her performance (R. 5, 48). The film enjoyed popularity throughout the nation, including many towns in Georgia (R. 5, 48).

Appellant, Billy Jenkins, manager and president of the Broad Avenue Cinema in Albany, Georgia, was exhibiting "Carnal Knowledge" on January 13, 1972, when the Dougherty County Sheriff's Office seized the film pursuant to a search warrant (R. 5, 5). Jenkins was arrested on February 10, 1972 for violation of Georgia Code Ann. §26-2105 (R. 4, 4; App. D), and was accused by a Dougherty County Grand Jury on March 6, 1972 (R. 4, 6; App. E).[2] The accusation employed the general chapter heading for Georgia Code

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[1] As certified by the Clerk of the Supreme Court of Georgia on August 14, 1973, the Record below includes five separate documents, numbered as follows: (1) Opinion of the Supreme Court of Georgia; (2) Remittitur of the Supreme Court of Georgia; (3) Enumeration of Errors filed in the Supreme Court of Georgia; (4) Trial Court Clerk's Record; and (5) Trial Court Reporter's transcript. Accordingly, as employed herein, a record reference such as "R. 5, 48" refers to the Record in the Supreme Court of Georgia, Document No. 5, page 48. A copy of the Record in the Supreme Court of Georgia is on file with the Clerk of this Court.

[2] As handed down by the Grand Jury, the accusation also named a co-defendant, Whitfield Woodall, but the case was subsequently nol prossed as to him (R. 4, 7).

Ch. 26-21 ("distributing obscene material")[3], but specified the charge against Jenkins *only* with selected language from §§26-2105 and 26-2011, stating that he did:

> knowingly exhibit a motion picture to the general public which motion picture contained conduct showing (a) an act of sexual intercourse (b) a lewd exposure of the sexual organs, (c) a lewd appearance in a state of partial or complete nudity, (d) a lewd caress or indecent fondling of another person [R. 4, 6].

Defendant Jenkins demurred to the accusation (R. 4, 8-12). Among the six grounds of the demurrer were challenges to Georgia Code Ann. §26-2105 as being unconstitutional on its face and as applied to him (R. 4, 8-10). The trial judge overruled each and every ground of the demurrer without comment (R. 4, 12).

Jenkins was tried in the Dougherty County Superior Court on March 22 and 23, 1972. The prosecutor introduced as evidence only the film "Carnal Knowledge," which was viewed by the jury, and then rested. Defendant introduced testimony about another film showing in Albany, as well as copies of explicit sexual

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[3] Although it bears the general heading "Distributing Obscene Materials," Ch. 26-21 comprises separate and distinct provisions dealing with obscenity and pandering (§26-2101); the unsolicited mailing of explicit sexual material (§26-2102); use of premises so as to constitute a public nuisance (§26-2103); obscenity and advertising therefor declared to be contraband (§26-2104); portraying acts which would constitute "public indecency" (§26-2105); and a severability provision (§26-2106).

books and magazines then available for purchase in Albany (R. 5).

The trial judge's instructions to the jury noted that the State's contentions lay in the accusation (R. 5, 61), which recites only selected language from §§2105 and 2011. Nevertheless, the instructions encompassed three separate and distinct statutory provisions: (1) §26-2101(b) (obscenity);[4] (2) §26-2101(c) ("pandering" or intent to pander); and (3) §26-2105 (exhibition of a film portraying acts which would constitute "public indecency") (R. 5, 66-67). On March 23, 1973, the jury returned a general verdict of guilty (R. 5, 76-77). Jenkins was fined $750.00 and sentenced to 12 months' probation (R. 4, 69).

Jenkins appealed the judgment to the Supreme Court of Georgia, arguing that §26-2105 was unconstitutional on its face and as applied to him; that he was denied due process of law; that "local" community standards could not constitutionally be employed; and that the film "Carnal Knowledge" is not obscene in any case (Appellant's Enumeration of Errors in the Supreme Court of Georgia, R. 3).

On June 21, 1973, this Court announced its de-

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[4] In connection with §26-2101(b), the jury was instructed to apply "community standards" to measure the obscenity of the film (R.5,66). It is apparent from the Record that "local" community standards were thus involved, *not* statewide or national standards. *See* Appellant's Enumeration of Errors in the Supreme Court of Georgia (R. 3, 1-3); Brief of Appellant in the Supreme Court of Georgia, page 10; Brief of Appellee in the Supreme Court of Georgia, pages 4-5.

cisions in *Miller v. California*, — U.S. —, and companion cases. On July 2, 1973, the Supreme Court of Georgia affirmed the conviction of Billy Jenkins by a vote of four to three. *Jenkins v. State*, — Ga. —, — S.E. 2d — (1973) (App. A).

The Supreme Court of Georgia characterized the "threshold question" as being "whether or not the showing of the film Carnal Knowledge violates [Georgia] Code Ann. Ch. 26-21 prohibiting the distribution of obscene materials" (App. A, 1). Although Jenkins had been charged only with a violation of §26-2105 and although that provision does not mention the word "obscene," the Supreme Court of Georgia concluded that:

> It is our view that a statute can provide criminal punishment without the definition of obscenity being included within that specific code section. The chapter in which Code Ann. §26-2105 is included at its very beginning amply defines obscenity and this particular Code section, which is merely a part of the chapter, must be read in accordance with the entire chapter . . . It seems clear then that the definition of obscenity as set forth in the chapter applies to all of the code sections dealing with this same question.
>
> The trial court correctly charged this definition of obscenity as the guideline for the jury to apply in this particular case . . . *Memoirs v. Mass.*, 383 U.S. 413, gave a test of obscenity to the effect that it must be established that the dominant theme appeals to prurient interest, the material affronts contemporary community standards, and is utterly without redeeming social value. This test

> has been included in our law (Code Ann. §26-2101(b)) thus making our present statute considerably more restrictive than the new test set forth in the recent case of *Miller v. California*, No. 70-73, 41 LW 4925. The *Miller* case, supra, further held that juries can consider State or local community standards in lieu of 'national standards,' thereby bringing the holding of this court in *Gornto v. State*, 227 Ga. 46 (178 S.E. 2d 894) in line with *Miller*, supra, on this point. [App. A, 2-3.]

On the basis of the above rationale, the Supreme Court of Georgia held that the statute was constitutional as construed by it, and that the trial judge's instructions to the jury were proper.[3]

Having viewed the film, the Court concluded that:

> [t]he evidence in this record amply supports the verdict of guilty by the showing of the film Carnal Knowledge in violation of the definition of distributing obscene materials under our Georgia Statutes. [App. A, 4.]

The dissents expressed surprise and shock that "Carnal Knowledge" could be denied First Amendment protection under *any* constitutional formula (Gunter, J., dissenting, App. A, 5; Hawes, J., dissenting, App. A, 16). According to Justice Gunter, the majority's finding that the film was obscene "teaches

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[3] The Supreme Court of Georgia's opinion does not mention the fact that the trial judge's instructions to the jury included §26-2101(c) as well as §§26-2105, 26-2011 and 26-2101(b).

me that the 'alarm of repression' was validly sounded" by the four Justices of this Court who dissented in *Miller* and its companion cases (App. A, 12).

Both dissents considered the majority's use of *Miller* to be a violation of due process, since Appellant's conviction was upheld under legal standards altogether different from and less exacting than the law that existed at the time of trial (Gunter, J., dissenting, App. A, 5-10; Hawes, J., dissenting, App. A, 16).

Justice Gunter also disagreed with the majority's construction of §26-2105, which he maintained was "patently unconstitutional" and incapable of rehabilitation (Gunter, J., dissenting, App. A, 14).

Justice Undercofler also dissented, but did not file an opinion.

THE QUESTIONS ARE SUBSTANTIAL

I. The constitutionality of the statute on its face, as applied, and as construed by the Supreme Court of Georgia.

(1) **On its face.** Motion pictures are a form of expression protected by the First Amendment. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). A particular film may be suppressed completely only if it is found to be obscene. *Paris Adult Theatre I v. Slaton*, — U.S. — (1973);[6] *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

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[6] The *Paris Adult Theatre* case involved the definition of obscenity contained in Georgia Code Ann. §26-2101(b). It did not involve §26-2105.

Georgia Code Ann. §26-2105 imposes an absolute prohibition against exhibition of motion pictures which portray any of the acts enumerated in Georgia Code Ann. §26-2011, the state's "public indecency" law. This *per se* prohibition operates "across the board," *cf. California v. LaRue*, 409 U.S. 109, 118 (1972), totally without regard to whether films portraying such acts are obscene. To the extent that it may be considered an "obscenity" law, §26-2105 makes sex and obscenity synonymous. *Cf. Roth v. United States*, 345 U.S. 476, 487 (1957).

On its face, §26-2105 therefore makes no attempt to "distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material." *Miller v. California*, — U.S. —, 21 (1973).[7] Its prohibitions are "appallingly overboard, permitting the suppression of a vast range of literary, scientific, and artistic masterpieces." *Paris Adult Theatre I. v. Slaton, supra* (dissenting opinion of Brennan, J., at 21).

This Court has not previously been confronted with the application of "public indecency" or "indecent exposure" laws, standing by themselves, to motion pictures and other forms of expression, but its prior decisions, *e.g., Cohen v. California*, 403 U.S. 15, 26 (1971), make it clear that they may not be so ap-

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[7] All page references employed herein in connection with this Court's obscenity decisions of June 21, 1973, are to the slip opinions.

plied.[8] Indeed, one court has already held that §26-2011, which enumerates the acts whose portrayal is prohibited by § 26-2105, could not constitutionally be applied to a stage play. *Southeastern Promotions, Ltd. v. City of Atlanta, Ga.*, 334 F. Supp. 634, 643 (N.D. Ga. 1971).[9] And other courts have so held with respect to attempts to so apply similar laws. *See, e.g., P.B.I.C., Inc. v. Byrne*, 313 F. Supp. 757, 765 (D. Mass. 1970) (three-judge court); vacated and remanded to consider mootness, 401 U.S. 987 (1971); affirmed on remand (June 16, 1971); vacated and remanded for reconsideration, — U.S. — (June 25, 1973).

Given this Court's recent holding that obscenity laws must now be limited in application to depictions or descriptions of specifically defined sexual conduct, *Miller v. California, supra*, it is likely that other attempts will be made to apply "indecent exposure"

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[8] Section 26-2105 is clearly aimed at expression, not conduct. *Cf. United States v. O'Brien*, 391 U.S. 367 (1968). Even assuming that Section 26-2105 evidences only a governmental interest in regulating conduct, the resulting restrictions on First Amendment freedoms are clearly intolerable. *Id.* at 376-377. *See Miller v. California, supra* at 11 n. 8: ". . . the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." *See also*: *Schacht v. United States*, 398 U.S. 58 (1970).

[9] Although it arose several months after April 1, 1971, the effective date of §26-2105, the *Southeastern Promotions* case involved §26-2011 alone. Since it became effective, §26-2105 has been challenged in one other case, but the issue of its constitutionality was not reached. *Cooley v. Endicator*, 340 F.Supp. 15 (N.D. Ga. 1971), *aff'd* per curiam, 458 F.2d 513 (5th Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973).

laws, either by themselves or in conjunction with other statutory provisions, to motion pictures and other forms of expression. This Court should therefore squarely hold that they may not be so applied consistently with the First Amendment.[10]

(2) **As applied.** Appellant was charged *only* with a violation of §26-2105. Nevertheless, the trial judge's instructions to the jury encompassed the definitions of prohibited offenses contained in §§26-2101(b) (obscenity) and 26-2101(c) ("pandering" or intent to pander), as well as §26-2105 (including §26-2011). (R.5,65-67). Since the Supreme Court of Georgia later held that the trial judge's instructions were proper, (App. A, 1), the constitutionality of each of these provisions is an issue in this case.

If the jury based its general verdict of guilty on §26-2105, Appellant's conviction must be reversed because the statute was clearly void for overbreadth. *See* Point I(1), *supra*.

If the jury based its verdict on the definition of obscene material contained in §26-2101(b), Appel-

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[10] Indeed, even in those areas in which states may have greater regulatory latitude (*e.g.*, "fighting words" or "obtrusive" exhibitions of explicit sexual material to unwilling persons), this Court has already indicated that a *per se* approach is constitutionally unacceptable. *See Rosenfeld v. New Jersey*, 408 U.S. 901 (1972); *Lewis v. City of New Orleans*, 408 U.S. 913 (1972); *Brown v. Oklahoma*, 408 U.S. 914 (1972); *Cason v. City of Columbus*, 409 U.S. 1053 (1972).

lant's conviction must likewise be reversed. This provision is not limited in application to material depicting or describing specifically defined sexual conduct, nor did the trial judge's instructions to the jury so limit it. *See Miller v. California, supra* at 12-13; *Paris Adult Theater I v. Slayton, supra.*

If the jury based its verdict on §26-2101(c), Appellant's conviction must also be reversed. This provision is not only hopelessly vague, *e.g., Coates v. City of Cincinnati*, 402 U.S. 611 (1971); it is also overbroad. While this Court has held that *actual* "pandering" may be relevant to a determination of obscenity in certain limited circumstances, *Ginzburg v. United States*, 383 U.S. 463 (1966), it has never suggested, let alone held, that there may constitutionally be such a crime as possession with intent to pander.

(3) **As construed.** The Supreme Court of Georgia has not yet construed §26-2105 "so as to avoid all constitutional difficulties." *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971); *Gooding v. Wilson*, 405 U.S. 518, 528 (1972). Despite the Court's attempt to rehabilitate it in this case, the statute remains subject to two possible interpretations, both of which raise substantial federal questions.

One possible interpretation would be that §26-2105 and §26-2101(b) must be employed together in obscenity prosecutions. This interpretation is possibly supported by the Court's holding that §§26-2105 and 26-2101(b) must be "construed together" and that §26-2105 "must be read in accordance with the entire chapter" in which it appears (App. A, 2).

Under this first possible interpretation, the pur-

portedly rehabilitated statute would still appear to be "susceptible of application to protected expression." *Gooding v. Wilson*, *supra* at 522. While §26-2101(b) is within constitutional boundaries as a *part* of the test of obscenity and may be retained, *Mishkin v. New York*, 383 U.S. 502, 508 (1966), some of the acts enumerated in §26-2011 (which is incorporated into §26-2105) would appear to make the statute overbroad. Certainly, a "lewd appearance in a state of partial or complete nudity" [§26-2011(c)] and a "lewd caress or indecent fondling of the body of another person" [§26-2011(d)] cannot reasonably be considered as "examples" of the type of "hard core sexual conduct" which this Court intended to reach in its decisions of June 21, 1973. *Miller v. California*, *supra* at 10-11, 20. Nudity *per se* does not constitute obscenity. *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958) (per curiam); *Rosenbloom v. Virginia*, 388 U.S. 450 (1967) (per curiam). Nor can it reasonably be assumed that §§26-2011(c) and 26-2011(d) enumerate the kinds of acts which this Court had in mind when it referred to "lewd exhibition of the genitals." *Miller v. California*, *supra* at 11. *Cf. Hunt v. Keriakos*, 428 F. 2d 606 (1st Cir. 1970), *cert. denied*, 400 U.S. 929 (1970).

Another possible interpretation is that the net effect of the Supreme Court of Georgia's construction is to make §26-2105's definition of obscenity substantially duplicative of §26-2101(b).[11] This interpreta-

[11] There apparently remain differences between the complete sections, for example, with respect to penalties and the fact that §26-2105 applies to performers as well as to exhibitors of performances. In addition, §26-2101(c) deals with "pandering," which is not mentioned in §26-2105.

tion might be supported by the Court's statements that "[t]he trial court correctly charged *this* definition of obscenity [*i.e.*, §26-2101(b)] as the guideline for the jury to apply in this particular case," and that this definition of obscenity, standing by itself, is "considerably more restrictive [*i.e.*, exacting upon the prosecution] than the new test set forth in *Miller v. California*," (App. A, 2-3; emphasis added). Indeed, the Court does not even allude to the *Miller* requirement that an obscenity statute must be limited in application to depictions or descriptions of specifically defined sexual conduct.

Under this second possible interpretation, the statute would clearly be void for overbreadth. For although this case was decided by the Supreme Court of Georgia on July 2, 1973, almost two weeks after *Miller*, such a construction of the statute would not supply the constitutionally requisite limitation. *Miller v. California*, *supra* at 9.

Accordingly, whichever interpretation is adopted, there remain substantial federal questions with respect to the constitutionality of §26-2105 as construed by the Supreme Court of Georgia.

In addition, substantial federal questions as to §26-2105, as construed, arise from the fact that Appellant and other Georgia motion picture exhibitors[12] must now guess at both the geographic parameters

[12] Appellant clearly has standing to challenge the validity of §26-2105 not only as applied to him, but also as it might be applied to others. *See, e.g., Gooding v. Wilson*, *supra* at 521; *Coates v. City of Cincinnati*, *supra* at 616; *Baggett v. Bullitt*, 377 U.S. 360,366 (1964).

and nature of the "local" community standards by which films will be evaluated. They do not and cannot know from the Supreme Court of Georgia's opinion whether "local" means county, city, neighborhood, block, or whatever. As this Court recently noted, such vagueness and uncertainty not only fail to give "fair warning" and not only invite "arbitrary and discriminatory enforcement," but also inhibit the exercise of First Amendment freedoms. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). Moreover, even if they had been defined precisely, Appellant believes that the use of "local" community standards is constitutionally impermissible in any case, and that §26-2105 is invalid for this reason also. Because of the importance of this issue, it is treated as a separate point. *See* Point III, *infra*.

II. **Due process of law.** All of the proceedings below, including those in the Supreme Court of Georgia, are part of the due process of law under which Appellant's conviction must "stand or fall." *Frank v. Mangum*, 237 U.S. 309, 327 (1915).

(1) "A person's right to reasonable notice of a charge against him . . . [is] basic in our system of jurisprudence. . . ." *In re Oliver*, 333 U.S. 257, 273 (1948). "Conviction upon a charge not made would be sheer denial of due process." *DeJonge v. Oregon*, 299 U.S. 353, 362 (1937).

Nevertheless, although Appellant was charged *only* with a violation of §26-2105, the trial judge's instructions to the jury allowed it to convict him of any one of three separate, distinct and substantially different offenses — §26-2105 (exhibition of a film por-

traying acts which would constitute "public indecency"); §26-2101(b) (obscenity); and §26-2101(c) ("pandering" or intent to pander). Since the jury returned only a general verdict of guilty, there exists a substantial possibility that Appellant was convicted upon a charge not made.

(2) In addition, if Appellant's conviction rests on §26-2101(c), it is so totally devoid of evidentiary support as to violate due process in and of itself. *Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Garner v. Louisiana*, 368 U.S. 157 (1961). Indeed, there is not a single word of evidence which even remotely suggested that "pandering" was an issue.

(3) Moreover, since the trial judge's instructions encompassed three separate and distinct statutory provisions and the jury returned only a general verdict of guilty, Appellant has been denied due process if any one of these provisions is unconstitutional. *Stromberg v. California*, 283 U.S. 359, 369-370 (1931).

(4) In affirming Appellant's conviction, the Supreme Court of Georgia "performed a remarkable job of plastic surgery upon the face" of §26-2105, holding that it "really meant something quite different" from what it clearly said. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153-154 (1969). *See also*: *Rabe v. Washington*, 405 U.S. 313, 315 (1972) (per curiam).

No fair reading of §26-2105 could have possibly informed Appellant that what it "really" meant was the separate and distinct offense of obscenity as defined by §26-2101(b). *Cohen v. California*, *supra* at 19. Indeed, §26-2105 does not even employ the word

"obscene." It would have taken "extraordinary clairvoyance" for Appellant to have guessed, let alone known, that the clear language of §26-2105 "really" meant what the Supreme Court of Georgia was destined to hold it meant more than 17 months after the commission of the alleged offense. *Shuttlesworth v. City of Birmingham, supra* at 156. *Cf. Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942); *Miller v. California, supra* at 1-2 n. 1.

Accordingly, even assuming §26-2105 would pass constitutional scrutiny as now construed by the Supreme Court of Georgia (but see Point I(3), *supra,* and Point III, *infra*), that construction cannot suffice "to restore constitutional validity to a conviction" that occurred more than a year earlier under the statute "as it was written." *Shuttlesworth v. City of Birmingham, supra* at 155.

(5) Although we have assumed that the Supreme Court of Georgia affirmed Appellant's conviction under §26-2105 (*see* Points I(3) and II(4), *supra*), this is by no means clearly the case. The majority's somewhat ambiguous opinion is susceptible to an interpretation that Appellant's conviction was affirmed under §26-2101, *not* under a radically rewritten version of §26-2105. If this be the case, Appellant has similarly been denied due process of law. *Cole v. Arkansas,* 333 U.S. 196 (1948); *Gregory v. City of Chicago,* 394 U.S. 111 (1969).

In short, however the proceedings below are viewed, Appellant has clearly been denied due process of law.

III. Use of "local" as opposed to statewide, com-

munity standards. In *Miller v. California, supra*, this Court held that the trial court's use of the "contemporary standards of the State of California" in evaluating the material in question was "constitutionally adequate." *Id.* at 19. "People in different *States* vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Ibid.* (emphasis added). *See also*: *Kaplan v. California*, __ U.S. __ (June 21, 1973).

The Supreme Court of Georgia held in this case, however, that it is permissible to apply "local" community standards. Appellant has argued (*see* Point I(3), *supra*) that the Supreme Court of Georgia's failure to define the geographic parameters and nature of the "local" community makes the concept so vague that he and other Georgia motion picture exhibitors "must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

In addition, even if the applicable "local" standards are defined precisely, it is constitutionally impermissible in any case to apply "local," as opposed to statewide, community standards in evaluating the prurient interest appeal and patent offensiveness of allegedly obscene material.[13] §26-2105 is therefore in-

[13] Applicable community standards do *not* govern determination of whether material is "utterly without redeeming social value" or "lacks serious literary, artistic, political, or scientific value." *See Miller v. California, supra* at 15-19. "The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, *regardless* of whether the government or a majority of the people approve of the ideas these works represent." *Id.* at 20 (emphasis added).

valid for this reason also.

First Amendment policy strongly favors the application of statewide, rather than "local," community standards in cases such as this. For when a determination of obscenity made on the basis of "local" standards is affirmed by the highest court of a state, that decision effectively deters sale or exhibition of the material involved throughout the state. Indeed, the film involved in this case has not been shown *anywhere* in the State of Georgia since July 2, 1973. In effect, the standards of one "local" community have dictated what may be seen throughout the State.[14] As pointed out by Justice Hawes in dissent in the Supreme Court of Georgia, approval of "local" community standards is "to place in the hands of the few the tastes and cultural advancement of the many who are members of the greater state community . . ." (App. A, 16). This Court should therefore require that what may be seen by the citizens of an entire state should at least be governed by the community standards of the entire state.

In the leading lower court case on the applicability of *statewide* community standards in obscenity cases, *In re Giannini*, 69 Cal. 2d 563, 72 Cal. Rptr. 655, 446

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[14] *Cf.* Coffin, Ch. J., concurring in *United States v. One Reel of Film*, ___ F. 2d ___ (1st Cir. July 16, 1973). Chief Judge Coffin would hold that "national" community standards must continue to govern obscenity determinations pursuant to 19 U.S.C. §1305, since otherwise the standards of the community surrounding the port of entry would dictate what might be seen across the nation. (Slip opinion, page 8.) The other two judges do not reach this issue. (Slip opinion, pages 2-3, n. 2)

P. 2d 535 (1968), *cert. denied*, 395 U.S. 910 (1969), the Supreme Court of California concluded that:

> . . . on balance a community comprised of the entire State of California is the more appropriate. This standard avoids administrative problems in determining the exact scope of the smaller community: whether it should be city, county, individual neighborhood within a city, or whatever. Moreover, a strong policy favors uniformity in application of state criminal law [citation omitted]; we promote this policy by assuring that application of the obscenity law in this state will be based on a uniform "community." [446 P. 2d at 547.]

Accordingly, to the extent that this Court's decisions of June 21 and 25, 1973, may have left this question unclear or unresolved, it presents a substantial federal question.[13]

IV. **"Carnal Knowledge" is not obscene.** This Court "must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression." *Miller v. California*, *supra* at 8. Accordingly, its "independent review of constitutional claims" continues to be available "when necessary." *Id.* at 10. And, as Justice Gunter said in dissent in the Supreme Court of Georgia, if there is ever to be a case in which such review is necessary, "then the case at bar is the case" (App. A, 11).

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[13] The Supreme Court of the State of Washington, for example, has already held that the community standards to be applied in accordance with this Court's decisions of June 21 and 25, 1973, are *statewide* rather than "local." *State v. J-R Distributors, Inc.* 512 P. 2d 1049, 1065 (July 27, 1973).

"Carnal Knowledge" is one of the most widely acclaimed films of recent years,[16] and appeared on many "10 Best" lists for 1971,[17] the year in which it was first released. It combines the talents of many of America's leading contemporary artists — *e.g.*, Mike Nichols (producer-director), Jules Feiffer (screenwriter), Jack Nicholson (actor). The film deals with sex, but then sex "has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." *Roth v. United States, supra* at 487. "[S]ex and obscenity are *not* synonymous." *Ibid.* (emphasis added).

Yet, by a vote of 4-3, the Supreme Court of Georgia has found "Carnal Knowledge" to be obscene.[18] This finding, which has understandably become a subject of widespread public concern,[19] raises

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[16] *See, e.g.*, the various reviews cited in Justice Gunter's dissent (App. A, 8-9).

[17] Including *The Oakland Tribune* (Robert Taylor); *The New York Times* (Vincent Canby); *The Nashville Tennesseean* (Harry Haun); *The Cleveland Plain Dealer* (Emerson Batdorff); *The Houston Chronicle* (Jeff Millar); and *The Denver Post* (Barry Morrison).

[18] The Court found the film to be obscene *per se*. Appellant did not permit minors to view the film (R. 5, 49). Nor is there any evidence of "obtrusive" exhibition or, despite the trial judge's instructions, "pandering."

[19] *See, e.g.*, "See No Evil," *Time*, July 16, 1973, page 73, column 2, for the view that the Supreme Court of Georgia's decision "indicates how drastically the Supreme Court's rules may be interpreted, or misinterpreted, by local authorities trying to decide what may or may not be seen by the public."

"the gravest constitutional problems." *Roth v. United States*, *supra* at 498 (opinion of Harlan, J.).

By whatever constitutionally permissible standard it is evaluated, "Carnal Knowledge" cannot possibly be characterized as a "public portrayal of hard core sexual conduct for its own sake." *Miller v. California*, *supra* at 20. It is far superior in accomplishment, and far less explicit in treatment, than material which this Court has already held *not* to be obscene. *See, e.g.*, *Kois v. Wisconsin*, 408 U.S. 229 (1972) (per curiam).

Indeed, if the film itself is the best evidence of what it represents, *Paris Adult Theatre I v. Slaton*, *supra* at 7, then a viewing of "Carnal Knowledge" clearly shows that it is *not* obscene.[20] The Supreme Court of Georgia's finding to the contrary is not only incorrect, but is also "wholly out of step with current American standards." *Memoirs v. Massachusetts*, 383 U.S. 413, 458 (1966) (dissenting opinion of Harlan, J.).

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[20] A print of the film is on file with the Clerk of this Court as part of the Record in the Supreme Court of Georgia.

CONCLUSION

For the reasons set forth above, the judgment of the Supreme Court of Georgia should be reversed.

Respectfully submitted,

TENCH C. COXE
WM. H. SCHRODER, JR.
1500 Candler Building
Atlanta, Georgia 30303

LOUIS NIZER
477 Madison Avenue
New York, New York
10022

JAMES BOURAS
522 Fifth Avenue
New York, New York
10036

Attorneys for Appellant

DAVID H. FLINT
J. KIRK QUILLIAN

Troutman, Sanders, Lockerman
& Ashmore

Of Counsel

APPENDIX A

607 tr 7

IN THE
SUPREME COURT OF GEORGIA

Decided: July 2, 1973

27692. JENKINS v. THE STATE

The evidence amply supports the verdict of guilty by the showing of the film Carnal Knowledge in violation of the definition of distributing obscene materials under Georgia statutes.

JORDAN, Justice. Billy Jenkins appeals his conviction and sentence for the offense of distributing obscene materials. The conviction is based on the fact that he exhibited in the film Carnal Knowledge in a movie theater in Albany, Georgia.

The threshold question to be decided is whether or not the showing of the film Carnal Knowledge violates Code Ann. Ch. 26-21 prohibiting the distribution of obscene materials. The trial jury, under proper instructions from the court, has found the defendant guilty. After a review of the record and a viewing of the film by this court we affirm.

Code Ann. § 26-2101(b) provides that "Material is obscene if considered as a whole, applying com-

munity standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters." The accusation charges the defendant "with the offense of distributing obscene material." The accusation without expressly referring to Code Ann. § 26-2105 is then cast in the language of the prohibited acts as defined in Code Ann. § 26-2011. The appellant contends that the accusation is defective in that it fails to include the definition of obscene materials as defined in Code Ann. § 26-2101(b). This view is adopted by the minority which seizes upon this alleged defect to hold Code Ann. § 26-2105 unconstitutional.

It is our view that a statute can provide criminal punishment without the definition of obscenity being included within that specific code section. The chapter in which Code Ann. § 26-2105 is included at its very beginning amply defines obscenity and this particular Code section, which is merely a part of the chapter, must be read in accordance with the entire chapter. This court has held that sections of the code which relate to the same subject matter shall be construed together. See *Touchton v. Echols County*, 211 Ga. 85, 87 (84 SE2d 81). It seems clear then that the definition of obscenity as set forth in the chapter applies to all of the code sections dealing with this same question.

The trial court correctly charged this definition of obscenity as the guideline for the jury to apply in this particular case. In *Roth v. United States*, 354

U.S. 476, it was held that "obscenity is not within the area of constitutionally protected speech or press." *Memoirs v. Mass.*, 383 U.S. 413, gave a test of obscenity to the effect that it must be established that the dominant theme appeals to prurient interest, the material affronts contemporary community standards, and is utterly without redeeming social value. This test has been included in our law (Code Ann. § 26-2101(b)) thus making our present statute considerably more restrictive than the new test set forth in the recent case of *Miller v. California*, No. 70-73, 41 LW 4925. The *Miller* case, supra, further held that juries can consider State or local community standards in lieu of "national standards," thereby bringing the holding of this court in *Gornto v. State*, 227 Ga. 46 (178 SE2d 894) in line with *Miller*, supra, on this point.

This court has held that the exhibition of an obscene motion picture is a crime involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole. *Evans Theatre Corporation v. Slaton*, 227 Ga. 377 (180 SE2d 712). In *Slaton v. Paris Adult Theater, I*, 228 Ga. 343 (185 SE2d 768) this court held that the films involved in that case were "hard core" pornography and that the commercial exhibition of such pictures is not protected by the first amendment. The Supreme Court of the United States which in effect affirmed the *Paris* case, supra, held that States have a legitimate interest in regulating commerce in obscene material and its exhibition in places of public accommodation, including "adult" theaters; further holding that the exhibition of obscene material in such places of public accommoda-

tion is not protected by any constitutional doctrine of privacy, and that a commercial theater cannot be equated with a private home. See *Paris Adult Theater v. Slaton*, No. 71-1051, 41 LW 4935.

We hold that the evidence in this record amply supports the verdict of guilty by the showing of the film Carnal Knowledge in violation of the definition of distributing obscene materials under our Georgia Statutes.

Judgment affirmed. All the Justices concur, except Undercofler, Hawes, and Gunter, JJ., who dissent.

In the Supreme Court of Georgia

27692. JENKINS v. THE STATE (607)

GUNTER, Justice (dissenting). The majority has today affirmed the criminal conviction of the appellant for showing the motion picture "Carnal Knowledge" to a theatre audience in Dougherty County, Georgia. The majority has held that the exhibition of this film in this "local community" is not entitled to the protection of the First Amendment as applied to Georgia and this "local community" by the Fourteenth Amendment. I am in disagreement with the majority, and I respectfully dissent. Having viewed this film with the other members of the Court, I must say, quite subjectively of course, that it is inconceivable to me that this work can be relegated to that area of verbal, written, and performing expression which falls outside of the protection of the First Amendment to the Constitution of the United States. Today's majority decision has drastically narrowed the concept of the First Amendment as applied to the performing arts in Georgia and "local communities" in Georgia.

I am in disagreement with my brothers of the majority for several reasons, and I shall attempt to set them forth in this dissent.

I.

The decision of the Supreme Court of the United States in *MILLER v. CALIFORNIA*, 41 LW 4925, (decided June 21, 1973), inaugurated a new era in the continuing constitutional contest between obscenity-pornography and the First Amendment. As the

MILLER decision said, the history of the Supreme Court's obscenity decisions has been "somewhat tortured". 41 LW at 4926. I would go one step further and say that the Supreme Court's decisions in this area, handed down during the recent and relatively short period of the First Amendment's entire history, have made it impossible for a dealer in such material to make a determination, with any degree of certainty, as to whether the material falls within the protection of the First Amendment or falls outside of its protection.

MILLER gave a new definition of pornographic, unprotected material; *MILLER* laid down basic guidelines for the trior of fact to use in determining what is protected material from what is unprotected material; *MILLER* changed the yardstick for measuring obscene material from "national standards" to "contemporary community standards"; and *MILLER* reiterated that if the application of its definitions, guidelines, and standards do not sufficiently protect First Amendment rights in any case, then First Amendment values are "adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary".

In the case at bar the film "Carnal Knowledge" was shown by the appellant to a theatre audience in Dougherty County, Georgia; a warrant and accusation were issued against the appellant charging him with having committed a crime by showing the film; and the appellant's' trial and conviction by a jury followed. All of this took place in the first four months of 1972, long before the changing of definitions, guide-

lines, and yardsticks of measurement by the *MILLER* decision rendered June 21, 1973. Yet the *MILLER* criteria have been applied by the majority in this case in affirming the appellant's conviction. That cannot be done, and for the majority to have done it in this case is, in my view, a denial of due process of law to the appellant.

In 1972 the appellant had every legal right to believe that the yardstick that he was to use in distinguishing unprotected from protected material was "national standards". The Supreme Court's opinion in *JACOBELLIS v. OHIO*, 378 US 184, (1964), now relegated by *MILLER* to a mere plurality decision, said: "We thus reaffirm the position taken in *ROTH* to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard." Six Justices made up the *JACOBELLIS* majority, and not one of them gave the slightest indication that a national standard was not the yardstick to be applied.

Understandably then, appellate court judges or persons dealing in material that might be unprotected legitimately used a national standard yardstick to determine for themselves whether the material was protected or not. In the case of *FELDSCHNEIDER v. THE STATE*, 127 Ga. App. 745, (1972), the Court of Appeals of Georgia said at page 749: "The trial court erred in limiting the meaning of contemporary community standards to 'the local community —to your own community.' If we were allowed to apply and be guided by the recent *GORNTO* case by the Supreme Court of our own state, the trial court's charge would have been correct; but we are controlled

by the three recent decisions of the United States Supreme Court, to wit, *JACOBELLIS, MANUAL ENTERPRISES* and *ROTH*, supra, and consequently, we hold that the trial court's charge in these two instances constituted reversible error." To the same effect is the decision in *FISHMAN v. STATE*, 128 Ga. App. 505, (1973), where a 7-2 majority of our Court of Appeals said on page 508: "The community standards to be applied are those of the national, not the immediate local community."

In January, 1972, when the motion picture "Carnal Knowledge" was exhibited by the appellant, the film had shown in the major cities of the nation, the major cities in Georgia, and in many of the cities and towns in Georgia without any contention being publicly made that it was obscene-pornographic.

"Carnal Knowledge" was reviewed in July, 1971, in the *Saturday Review*, the *Washington-Post*, the *New York Daily News*, *Time*, the *Atlanta Constitution*, and the *Atlanta Journal*. None of these reviews gave the slightest indication that the film was obscene-pornographic. Terry Kay, *Atlanta Journal* amusements editor, concluded the review in that Georgia paper as follows: "In the end there is no real triumph for the characters. Different attitudes, perhaps, but no triumph.

"The effect is with the viewer, who — like it or not — has been stung to the quick by a prodding of human values.

"So what does 'Carnal Knowledge' tell us? Simply that we are victims, or subjects to be victimized, by

the very life-system we create for ourselves.

" 'Carnal Knowledge' says it with sex. It is theatrical that way — sex being the denominator common to everyone. But it could be said about any facet of our lives.

"It is a movie that will be controversial in the heaviest sense of the word, but it is still one of the best that we have had in a long time."

In *MILLER* the Chief Justice of the United States said: ". . . a 'national standard' of First Amendment protection enumerated by a plurality of this Court, was correctly regarded at the time of the trial as limiting State prosecution under the controlling case law." However, the Chief Justice then went on to say that since the appellant in that case did not raise the "national standard" issue at the trial but only on appeal, the trial court's charge to the jury that it consider state community standards was not a constitutional error.

To me, this retroactive application of the *MILLER* yardstick as opposed to the *JACOBELLIS* yardstick has the effect of saying that a theatre operator could rely on *JACOBELLIS* in January, 1972, in deciding whether to exhibit a film, but in April, 1972, when he was tried before a jury for exhibiting the film, it was all right for the Court and jury to completely ignore the standard established by *JACOBELLIS* and apply a different standard which had not at the time of the trial been enunciated and which would not be established by the Supreme Court of the United States until June 21, 1973.

I should add that in the present case the "national standard" issue was raised by the appellant in both the trial court and the appellate court.

The majority here today has retroactively applied the *MILLER* "contemporary community standards" yardstick in affirming a criminal conviction, thereby depriving appellant of his legal right in January, 1972, to have applied a "national standard" yardstick in making his decision that the film "Carnal Knowledge" came within the protection of the First Amendment.

If, between the time of *JACOBELLIS* and the time of *MILLER*, the Justices of the Supreme Court of the United States did not know what yardstick to apply, and then changed rather dramatically from one to the other, how can a theatre manager in Georgia be faulted, much less criminally convicted, for having made a decision in 1972 based on the *JACOBELLIS* national standard?

The retroactive application of *MILLER* in this manner in this case by the majority has, in my opinion, deprived appellant of due process of law under both the Georgia and Federal Constitutions.

II.

Assuming that what I have said heretofore, to the effect that the retroactive application of local community standards in this case is constitutionally impermissible, is incorrect, and the majority today holds that I am wrong on this point, then the film "Carnal Knowledge" is, in my judgment, entitled to the protection of the First Amendment even after applying local contemporary community standards.

MILLER, as noted earlier, reasserts that First Amendment values "are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."

The so-called plurality opinion in *JACOBELLIS* said: "Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected. . . . We would reiterate . . . that 'the portrayal of sex, e.g. in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.' . . . It follows that material dealing with sex in a manner that advocates ideas, . . . or that has literary or scientific or artistic value or any other form of social importance may not be branded as obscenity and denied the constitutional protection."

As I read the majority opinion in *MILLER*, it approves and reaffirms these enunciations procreated into constitutional law in *JACOBELLIS* by a mere plurality of the Justices.

If there ever has been or will be a case where independent appellate review of the facts as to whether the material involved is constitutionally protected is necessary to protect First Amendment values, then the case at bar is the case.

This Court has conducted an independent review. We have seen the film "Carnal Knowledge".

Four members of this Court deem it to be obscene, pornographic, unprotected material. Three members of this Court, including the writer, would hold it to be constitutionally protected material.

In Division Four of the *MILLER* opinion the Chief Justice said: "The dissenting Justices sound the alarm of repression. . . . These doleful anticipations assume that Courts cannot distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material."

My experience with this one case teaches me that the "alarm of repression" was validly sounded; it also teaches me that the *MILLER* majority's assumption, that Courts can distinguish commerce in ideas that is protected from commercial exploitation of obscene material that is not protected, is a too optimistic assumption. The instant case is the proof that is in the pudding; material is pornographic and unprotected in the subjective mind and senses of one judge; and that same material has serious literary or artistic value in the subjective mind and senses of another judge; all of which leads me to repeat that often-stated assertion by lawyers: a majority of the Justices of the Supreme Court of the United States is not final because the members of that majority are infallible, — that majority is infallible only because it is final.

If the motion picture "Carnal Knowledge" is not entitled to judicial protection under the First Amendment's umbrella, then future productions in this art form utilizing a sexual theme are destined to be obscenely soaked in the pornographic storm.

III.

The appellant's conviction should not be affirmed because he was not legally accused of having committed a crime.

A warrant was issued for the appellant for having violated Ga. Code § 26-2105. This Code Section was enacted by the Georgia legislature in 1971, and this case is the first time that this Court has given consideration to it.

This statute, as relevant in this case, provides as follows:

> "(a) Every person who, during the course of a . . . motion picture, engages in conduct which would be public indecency under § 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.
>
> "(b) Every person who . . . knowingly exhibits . . . a motion picture . . . containing such conduct shall be guilty of a misdemeanor."

Georgia Code § 26-2011, our public indecency statute referred to in Code § 26-2105, is as follows:

> "A person commits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor: (a) An act of sexual intercourse; (b) a lewd exposure of the sexual organs; (c) a lewd appearance in a state of partial or complete nudity; (d) a lewd caress or indecent fondling of the body of another person."

It is thus seen that the conduct referred to in Code § 26-2105 is "public indecency" or "indecent exposure". Code § 26-2105 does not make reference in any manner whatsoever to "obscene materials".

Prior to arraignment and trial the appellant attacked and moved to dismiss the Accusation that was preferred against him based on the warrant. His contention was that the warrant and the Accusation were based on the 1971 Georgia statute (Code § 26-2105), and that the 1971 Georgia statute was unconstitutional. The trial judge overruled these constitutional attacks.

In my opinion the 1971 Georgia statute is patently unconstitutional. This statute attempts to transfer the crime of public indecency into the motion picture art form. This cannot be done if the First Amendment means anything at all, and if a motion picture is a work or material that enjoys protection under the First Amendment. Conduct performed in person and in public, such as indecent exposure, is not protected by the First Amendment. Conduct portrayed in the motion picture art form is protected by the First Amendment unless the portrayal, considered in the entire context of the motion picture, lacks "serious literary, artistic, political, or scientific value" (*MILLER v. CALIFORNIA* standard) or is "utterly without redeeming social value" (pre-*MILLER v. CALIFORNIA* standard).

In other words, a single or even several acts of public indecency portrayed in a motion picture or described by the written word in a novel cannot be defined as a crime because of the protection given to

motion pictures and novels as forms of expression by the First Amendment. The entire motion picture or the novel must be considered as a whole in determining whether the work is pornographic, thus falling outside of the protection of the First Amendment.

The *MILLER* opinion says: "State statutes designed to regulate obscene materials must be carefully limited. See *INTERSTATE CIRCUIT, INC. v. DALLAS*, supra 390 US, at 682-685 (1968)."

The 1971 Georgia statute is not "carefully limited". It says that an actor who portrays one or more acts of indecent exposure in a motion picture is guilty of having committed a crime. It further says that one who exhibits a motion picture containing such a portrayal is guilty of a crime.

I think that this 1971 Georgia statute is directly violative of the First Amendment, and I further think that it violates the Fourteenth Amendment in that it is overly broad.

The warrant in this case, and the Accusation based on the warrant, charged the appellant only with having violated Code § 26-2105. In my view this statute is unconstitutional. A criminal charge cannot be founded on a void statute. Therefore the Accusation charged no crime at all, and it should have been dismissed by the trial judge when properly attacked in the trial court.

It follows that I would reverse this criminal conviction.

I respectfully dissent.

HAWES, Justice, dissenting. I join in the dissenting opinion of Mr. Justice Gunter, a classic of legal reasoning and First Amendment wisdom, and I would add nothing to what has been said were it not for my concern for the grave danger to free speech and expression inherent in the majority opinion and about which I cannot here remain silent.

Two aspects of the opinion of the majority which are of most concern to me are the following: (1) the tacit approval of small towns and hamlets as being the "community" from which the standard for obscenity is drawn; and (2) the determination by four members of this court, upon an independent appellate review, that the film *Carnal Knowledge* is obscene, that is, that it has no artistic or literary value and is "utterly without redeeming social value." To give approval to the first would be to place in the hands of the few the tastes and the cultural advancement of the many who are members of the greater state community and to deny in large measure the basic freedom of individuals to participate as they will in the general commerce of ideas. And to approve of the latter would be to equate realistic commentary on our sexual natures in a social context with that of obscenity, an equivalence surely belied as a matter of constitutional law and as a matter of fact. Certainly, the film under consideration here is not the kind of hard-core pornography we removed from public consumption in *Slaton v. Paris Adult Theater I*, 228 Ga. 343 (185 SE2d 768) (1971).

I add these few remarks only because I believe if the majority opinion is accepted we shall have suffered a serious injury to free speech and free expression in Georgia.

APPENDIX B

27692

SUPREME COURT OF GEORGIA

ATLANTA, July 2, 1973

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:
Billy Jenkins v. The State.

This case came before this court upon an appeal from the Superior Court of Dougherty County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur except Undercofler, Hawes & Gunter, JJ., dissent.

BILL OF COSTS, $30.00

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA, AUG. 14, 1973

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that Smith, Gardner, Wiggins, Geer & Brimberry paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, *Clerk*

APPENDIX C

IN THE

SUPREME COURT OF GEORGIA

BILLY JENKINS,	:	
Appellant	:	
vs.	:	CASE NO. 27692
THE STATE,	:	
Appellee	:	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that BILLY JENKINS, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Georgia, affirming the judgment of conviction, entered herein July 2, 1973. This appeal is taken pursuant to 28 U.S.C. §1257 (2).

TENCH C. COXE
Attorney for Appellant

OF COUNSEL:

TROUTMAN, SANDERS, LOCKERMAN
& ASHMORE
1500 Candler Building
Atlanta, Georgia 30303

[The above Notice of Appeal was filed on September 20, 1973, and all parties required to be served have been served. The Certificate of Service has been omitted from this Appendix.]

APPENDIX D

WARRANT

THE STATE
VERSUS

Billy Jenkins

Charge VIOLATION GEORGIA CODE SECTION 26-2105

Lynn L. Stout Prosecutor

The above defendant made bond on the ____ day of _____, 19____

_____
Sheriff's Office

WITNESS:

Lynn L. Stout - Investigator

J. Wayne Parrish - Investigator

Warrant delivered to sheriff's office

Date February 10, 1972

APPENDIX D

GEORGIA, Dougherty County

Personally Comes Lynn L. Stout Who, on oath, says to the best of his knowledge and belief Billy Jenkins did, in said County, on the 9th day of February, 19 72, commit the offense of violation of Georgia Code Section 26-2105.

And deponent makes this affidavit that a warrant may issue for his arrest.

_____ (Seal)

Sworn to and subscribed before me 10th day of February, 19 72

_____

Judge City Court, Albany, Georgia

GEORGIA, Dougherty County

To any Sheriff, Constable or Marshal of said State—GREETING:

Lynn L. Stout Makes oath as above which is hereby made part of this warrant. You are hereby commanded to arrest Billy Jenkins and bring him before me or some other judicial officer of said County to dispose of as the law directs. Fail not.

Witness my hand and seal February 10, 1972.

_____ (Seal)

Judge City Court, Albany, Georgia

A commitment hearing was held this _____ day of _____ 19____ and after hearing evidence it is ordered that the defendant be committed for said offense in default of his giving bond, with good security, in the sum of _____ Dollars for his appearance at the Superior Court to be held on the third Monday in _____ 19____.

Witness my hand and seal _____ 19____.

_____

Judge Pro Hac Vice City Court, Albany, Georgia

APPENDIX E

No._____

SUPERIOR COURT,
DOUGHERTY COUNTY

March Term, 19 72

THE STATE
vs.

Billy Jenkins

DISTRIBUTING OBSCENE MATERIAL

ACCUSATION

Foreman.

ROBERT W. REYNOLDS,
District Attorney

Lynn Stout
Prosecutor.

Received in Open Court from the sworn Grand Jury Bailiff, and filed in office this 6th day of March 19 72.

Clerk.

APPENDIX E

GEORGIA, DOUGHERTY COUNTY:

THE GRAND JURORS, selected, chosen and sworn for the County of Dougherty, to-wit:

I _____ Foreman.

Robert W. Reynolds, District Attorney,

on information of Lynn Stout

In the name and behalf of the citizens of Georgia, charge and accuse Whitfield Woodall and Billy Jenkins with the offense of Distributing Obscene Material for that the said accused, in the County aforesaid, on the 13th day of January, Nineteen Hundred and Seventy-Two, did then and there knowingly exhibit a motion picture to the general public which motion picture contained conduct showing (a) an act of sexual intercourse, (b) a lewd exposure of the sexual organs, (c) a lewd appearance in a state of partial or complete nudity, (d) a lewd caress or indecent fondling of another person

contrary to the laws of said State, the good order, peace and dignity thereof.

ROBERT W. REYNOLDS, District Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Jurisdictional Statement to the Supreme Court of the United States, upon counsel for Appellee, Mr. Tony H. Hight, Suite 406, 501 Pulliam Street, S.W., Atlanta, Georgia 30312 and B. Sam Ingram, Jr., District Attorney, Pro Tem, City-County Government Building, Albany, Georgia, by depositing copies of said Jurisdictional Statement in the United States Mail properly addressed with sufficient postage thereon to insure delivery.

I hereby certify that all parties required to be served have been served.

This .... day of ....., 1973.

WILLIAM H. SCHRODER, JR.
Attorney for Appellant

Troutman, Sanders, Lockerman
& Ashmore
1500 Candler Building
Atlanta, Georgia 30303